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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 115

JOHN A. HAYS, PETITIONER,

v.

ROBERT B. ANDERSON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 40) is reported at 262 F. 2d 725.

JURISDICTION

The judgment of the Court of Appeals was entered on December 24, 1958 (R. 42) and a petition for rehearing was denied on February 12, 1959 (R. 50). On May 5, 1959, Mr. Chief Justice Warren entered an

order extending the time for filing a petition for a writ of certiorari until June 13, 1959 (Pet. 18). The petition for a writ of certiorari was filed on June 12, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly held that petitioner was not denied any procedural rights in removal proceedings because he was not given a further hearing before a departmental grievance committee.

STATEMENT

Petitioner brought this action pursuant to 28 U.S.C. 2201 for a declaratory judgment that he was unlawfully removed from his position as Internal Revenue Agent, and for reinstatement (R. 1-7). The pertinent facts are as follows:

Petitioner, a non-veteran, formerly occupied a classified position in the Civil Service System as an Internal Revenue Agent for the Internal Revenue Service at Jacksonville, Florida. On March 23, 1955, petitioner was served with a letter of charges (R. 11-13) which he answered by his affidavit of March 30 (R. 13-17). A final notice of adverse action, dated April 13, 1955, informed petitioner that the charges against him had been sustained and that he was to be removed from the Service effective April 29, 1955[1] (R. 18-21).

[1] The charges against petitioner which were sustained were that: (1) while serving as a federal agent, he had prepared and filed false income tax forms for three consecutive years; (2) he had falsified an official report of the work he had done and had made false entries on the Daily Sign Out Sheet; and (3) he had insulted a taxpayer during a conference. Four specifications of one of the charges against petitioner were not sustained.

Following this notice, petitioner appealed to the Regional Commissioner, Internal Revenue Service.[2] He was granted an oral hearing on July 27, 1955, on which date he appeared with his counsel (R. 26, 27). The Regional Commissioner affirmed the removal (R. 26), and petitioner then appealed to the Commissioner of the Internal Revenue Service (R. 26-27). He was informed by letter of October 5, 1955, from Acting Commissioner Delk, that his removal had been sustained and his appeal denied (R. 27).

On October 14, 1955, petitioner appealed to the Director of Personnel of the Treasury Department and requested a hearing (R. 36). The Director of Personnel informed petitioner that he was not entitled to a hearing, but that he could submit additional written material if he wished (R. 36). Petitioner submitted additional information (R. 28). His appeal was denied on December 13, 1955 (R. 28). Petitioner again wrote to the Director of Personnel and renewed his request for a hearing (R. 28). The Director, in his reply of January 12, 1956, again denied this request and informed petitioner that he was not entitled to a hearing (R. 28). The Director further noted that petitioner had been afforded a hearing at the Regional Commissioner's Office in Atlanta (R. 27, 28).

Petitioner then brought this action claiming, *inter alia*, that the Treasury Department had violated Section 4(d) of its grievance procedure by denying him a hearing. The court rejected this contention and

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[2] Petitioner also appealed to the Civil Service Commission (R. 21). The Commission denied the appeal. While the legality of the Commission's ruling was challenged and resolved against petitioner in both courts below, he has explicitly abandoned that contention before this Court (Pet. 5).

granted the Government's motion for summary judgment (R. 10).

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed *per curiam* (262 F. 2d 725). The court held that petitioner had not been denied any procedural rights by the Treasury Department.

ARGUMENT

Petitioner's sole contention is that the Treasury Department did not comply with its own regulations in removing him from Government service without a hearing before a grievance committee. He relies solely on a provision of the Department's grievance procedures which, he contends, makes such a hearing mandatory. But the grievance procedure upon which petitioner relies was not applicable to his administrative appeal.[3] Grievance procedures do not relate to removals, but deal with employee complaints arising in the day-to-day working relationships between employees or between an employee and his supervisor. See Chapter E2, Federal Personnel Manual (Pet. 29).

Petitioner contends (Pet. 12) that the Department's grievance procedure has been made applicable to removals of non-veterans. He relies, however, upon a memorandum to that effect issued by the District

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[3] This case, therefore, is significantly different from the decisions of this Court upon which petitioner relies (Pet. 7-8). For in those cases it was not denied that the official had not complied with his own regulations; the question was whether such non-compliance was excused by the fact that the procedures provided thereby were not required by statute. Here, however, the sole question is whether there has been compliance with the applicable regulations. The Government does not deny that, whatever might be the Secretary's authority to remove petitioner without a hearing in the absence of regulations, the Secretary must provide a hearing if the regulations make it mandatory.

Director of Internal Revenue in the Jacksonville, Florida, office (Pet. 12, 24-25). While the District Director had full authority to prescribe the appeal procedures for his office, he obviously had no authority to prescribe the procedures which would be followed by the Director of Personnel of the Treasury Department. The latter expressly told petitioner, in denying his request for a hearing, that any oral hearing which may have been required by the memorandum of the District Director "was a regional matter," and that "In so far as appeals to the Treasury Department are concerned there is no provision requiring an oral hearing, and therefore nothing was denied you" (R. 28).

Petitioner had no statutory right to a hearing. On the contrary, 5 U.S.C. 652(a), which governs removal or suspension from the classified civil service, expressly provides that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay." The statute requires only that a person whose removal or suspension is sought must (1) have notice of the charges preferred against him; (2) be furnished with a copy of the charges; (3) be allowed a reasonable time for filing a written answer to the charges, with affidavits; and (4) be furnished at the earliest possible date with a written decision on such answer. Petitioner concedes (Pet. 9), as indeed he must, that the foregoing procedural requirements were observed. Indeed, petitioner was given more favorable treatment than the statute requires, since he had a hearing at the regional office in Atlanta and several administrative appeals (see *supra*, pp. 2-3).

In the circumstances, we submit that both courts below correctly concluded that petitioner was not denied any procedural rights because he was not given a hearing before a departmental grievance committee.[4]

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[4] Even if the department's grievance procedures were applicable to removals, we submit that it is left to the discretion of the Secretary to grant or deny a hearing. The provision upon which petitioner relies, Section 4(d) of the grievance procedure (Personnel Circular No. 165) (March 27, 1952), provides that if an employee requests a hearing (Pet. 23, emphasis added), "a committee of three *may* be formed to hear and consider the grievance and make a recommendation" but that a committee "will not be formed to hear trivial complaints." The term "may" in ordinary meaning "carries no thought of compulsion—it is permissive or power giving and not at all compelling, discretionary, and not mandatory." *Lansdown* v. *Faris*, 66 F. 2d 939, 941 (C.A. 8). See also *United States* v. *Thoman*, 156 U. S. 353, 359; *Terre Haute & Ind. R. Co.* v. *Indiana*, 194 U.S. 579, 588. Accordingly, the word "may" in a statute has been uniformly construed "as permissive and to vest discretionary power, unless the context of the statute clearly indicates a purpose to use it in a mandatory sense." *United States* v. *Bowden*, 182 F. 2d 251, 252 (C.A. 10). See also *United States* v. *Thoman*, *supra*, at 359; *Farmers Bank* v. *Federal Reserve Board*, 262 U.S. 649, 662-663; and *Terre Haute & Ind. R. Co.* v. *Indiana*, *supra*, at 588.

The context in which the word "may" is used in Section 4(d) does not "clearly indicate a purpose to use it in a mandatory sense." On the contrary, the other provisions of Section 4(d) confirm the view that the Secretary intended the word "may" to have its normal meaning as permissive. For, in setting forth the composition and duties of a committee which "may" be formed under that section, the grievance procedure abandons permissive language and mandatorily provides that the committee "*will* be composed as follows * * *," that it "*shall* hear orally the employee presenting the grievance," and that after considering the evidence it "*will* make its report" to the Director of Personnel (Pet. 6, emphasis added). The fact that Section 4(d) provides that a grievance committee "will not be formed to hear trivial complaints" (Pet. 6) does not, as petitioner suggests (Pet. 11-12), reflect an intent to provide for such committee in all other cases. It means only that in cases of trivial complaints a request for a hearing will not even be considered. In more serious cases, however, the Department "may" form a committee if, in its discretion, that procedure is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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